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Tuni & G, a California General Partnership

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

TUNI & G, a California General Partnership)

CASE NO.: 08-CV-0410 BTM JMA

Plaintiffs,

**ANSWER TO COUNTERCLAIM OF
DEFENDANTS**

v.

SPENCER GIFTS, LLC, a Delaware Limited
Liability Company; SPENCER GIFTS
HOLDING, LLC, a Delaware Limited Liability
Company; SPENCER GIFTS ONLINE, LLC, a
Delaware Limited Liability Company; and
DOES 1 through 10, inclusive,

Defendants.

SPENCER GIFTS, LLC, a Delaware Limited
Liability Company; SPENCER GIFTS
HOLDING, LLC, a Delaware Limited Liability
Company; SPENCER GIFTS ONLINE, LLC, a
Delaware Limited Liability Company; and
DOES 1 through 10, inclusive,

Counter-Claimants,

v.

TUNI & G, a California General Partnership,

Counter-Defendants.

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Counter-Defendant, Tuni & G, Inc., a California General Partnership, hereby answers the Counterclaim of Spencer Gifts LLC, a Delaware Limited Liability Company; Spencer Gifts Holding, LLC, a Delaware Limited Liability Company; Spencer Gifts Online, LLC, a Delaware Limited Liability Company, (collectively "Counterclaimants"), and responds as follows:

ALLEGATIONS¹

1. Answering paragraph 36 of the Counterclaim, Counter-Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 36, and on that basis, denies each and every allegation contained therein.

2. Answering paragraph 37 of the Counterclaim, Counter-Defendant admits that it has asserted claims against Counter-Claimants in its Complaint which relate to U.S. Trademark Registration No. 3158551.

3. Answering paragraph 38 of the Counterclaim, Counter-Defendant denies the allegations contained therein.

4. Answering paragraph 39 of the Counterclaim, Counter-Defendant denies the allegations contained therein.

PRAYER FOR RELIEF

In answer to the Prayer for Relief contained in Counter-Claimants' Answer and Counterclaim, Counter-Defendant denies that Counter-Claimants are entitled to any of the relief sought in paragraphs 1-3, and further denies that Counter-Claimants are entitled to any relief whatsoever.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

(Fails to State a Cause of Action)

As a first, separate and distinct affirmative defense, the answering Counter-Defendant alleges that the Counterclaim, and each and every cause of action contained therein, fails to state

¹ Counterclaimants include with their Answer their Counterclaim in one (1) document consecutively numbered at paragraphs 36-38 and Counterdefendant responds to the referenced numbers of such paragraphs.

1 facts sufficient to constitute a cause of action against this answering Counter-Defendant.

2 **SECOND AFFIRMATIVE DEFENSE**

3 **(Estoppel)**

4 As a second, separate and distinct affirmative defense, the answering Counter-Defendant
5 alleges that Counter-Claimant is estopped from asserting any claims it has asserted in the
6 counterclaim.

7 **THIRD AFFIRMATIVE DEFENSE**

8 **(Unclean Hands)**

9 As a third separate and distinct affirmative defense, the answering Counter-Defendant is
10 informed and believes and thereon alleges that Counter-Claimant is barred from recovery due to
11 its own unclean hands.

12 **FOURTH AFFIRMATIVE DEFENSE**

13 **(Laches)**

14 As a fourth, separate and distinct affirmative defense, this answering Counter-Defendant
15 is informed and believes and thereon alleges Counter-Claimant is barred from recovery in whole
16 or in part by laches.

17 **FIFTH AFFIRMATIVE DEFENSE**

18 **(Waiver)**

19 As an fifth, separate and distinct affirmative defense, this answering Counter-Defendant
20 is informed and believes and thereon alleges Counter-Claimant is barred from recovery in whole
21 or in part by waiver.

22 **SIXTH AFFIRMATIVE DEFENSE**

23 **(Colorable Imitation)**

24 As an sixth, separate and distinct affirmative defense, this answering Counter-Defendant
25 is informed and believes and thereon alleges that Counter-Claimants' mark is a colorable
26 imitation of Counter-Defendant's mark.

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SEVENTH AFFIRMATIVE DEFENSE

(Not Fair Use)

As an seventh, separate and distinct affirmative defense, this answering Counter-Defendant is informed and believes and thereon alleges that Counter-Claimants' use of its mark does not constitute fair use.

EIGHTH AFFIRMATIVE DEFENSE

(Acquiescence)

As an eighth, separate and distinct affirmative defense, this answering Counter-Defendant is informed and believes and thereon alleges that Counter-Claimant is barred by acquiescence from asserting any claims which it has asserted in the counterclaim.

NINTH AFFIRMATIVE DEFENSE

(Federal Trademark Registrations Valid)

As an ninth, separate and distinct affirmative defense, this answering Counter-Defendant is informed and believes and thereon alleges that it's federally registered trademark at issue is valid.

TENTH AFFIRMATIVE DEFENSE


(Likelihood of Confusion)

As an tenth, separate and distinct affirmative defense, this answering Counter-Defendant is informed and believes and thereon alleges the Defendants' use of "Don't Ya Wish Your Mommy Was Hot Like Mine" is likely to be confused with Counter-Defendant's registered trademark.

Dated: April 18, 2008

Respectfully submitted,

THE LAW OFFICE OF MATTHEW A. BECKER, PC

By: 
Matthew A. Becker, Esq.
Attorney for Plaintiff,
Tuni & G, a California General Partnership

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